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UPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 17-1448

PLEASANT HARRIS, et al.

against

THE PRESBYTERY OF SOUTHEAST IOWA, a Corporation

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE STATE OF IOWA

OEHLER, RADIG, & HOY

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Respondent respectfully prays that the Petitioners' petition for writ of certiorari be denied because there is no need to review the final order of the Supreme Court of the State of Iowa.

OPINION BELOW

Respondent has no objection to the statement of the opinion below.

JURISDICTION

Respondent agrees that the jurisdiction, if any, of the Supreme Court of the United States is under 28 U.S.C. 1257(3). Respondent believes that no jurisdiction exists for the Supreme Court of the United States to hear or decide Questions III and IV contained in Petitioners' petition for the reason that these issues were not

properly raised in the court below. Respondent will present its arguments on this point in its argument. The Respondent's Statement of the Case also contains pertinent material on this point.

QUESTIONS PRESENTED

Respondent believes that only Questions I and II may be considered by the Supreme Court of the United States because Questions III and IV were not properly raised in the court below. Respondent will present this aspect in its statement of the Case and Argument.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent believes that only the Fourteenth Amendment to the Constitution of the United States is involved because Article 1, Section 10 of the Constitution applies to Question III which cannot be considered by this court.

STATEMENT OF THE CASE

Respondent would agree with Petitioners' statement of the Case with the addition of the fact that in the trial court Defendants' (Petitioners') alleged in answer to Plaintiff's petition, that the statute (Section 614.24) was unconstitutional as a denial of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, and that that was the only allegation of unconstitutionality by Defendants. See also the opinion in the Supreme Court of Iowa.

ARGUMENT IN OPPOSITION TO WRIT

Respondent believes that the issue first before the Court is whether or not this case is one which requires consideration by this Court. Petitioners indicate that conflicting decisions have been reached in State Supreme Courts. Petitioners cite three cases in their petition:

Board of Education v. *Miles*, 207 NE 2d 181, 15 NY 2d 364 (1965); *Morrison* v. *Fenstermocher*, 166 Kan 568, 203 P 2d 160 (1949); and *Biltmore Village* v. *Royal*, 71 So 2d 727, 41 ALR 2d 1380 (Fla 1954), which are argued to be contra to the position of the Supreme Court of Iowa. Each of these three cases are discussed in the Iowa Supreme Court opinion. *Board of Education* v. *Miles*, supra, is contrary to the Iowa decision but is also contra to the weight of other cases and is the only case, to the knowledge of Respondent, that is in conflict with the Iowa decision. The other two cases presented by Petitioners are distinguishable from the Iowa case and so are not in conflict. The *Morrison* and *Biltmore Village* cases, supra, are distinguished because the statutes there required legal action be taken to preserve the reversionary right, even if the legal cause of action had not occurred. The Courts felt that this was not a reasonable means of preserving the reversionary interest.

Additionally, the Iowa Court cites four cases from other jurisdictions which are in agreement with the Iowa decision. Each case, *Wichelman* v. *Messner*, 83 NW 2d 800, 250 Minn.88 (1957); *Hiddleston* v. *Nebraska Jewish Education Society*, 186 NW 2d 904, 186 Neb 786 (1971); *Town of Brooklyn* v. *Carey*, 245 NE 2d 446, 355 Mass 424 (1969); and *Selectmen of Town of Nahant* v. *United States*, 293 F. Supp. 1076 with the Iowa decision. Thus there is no real conflict among the state courts.

Petitioners argue that a determination of the constitutionality of such statutes would lend stability to land titles. With this contention Respondent would agree with the caveat that only if the decision of the Iowa Supreme Court is upheld would stability be provided.

The Court is aware that in Iowa, Minnesota, Nebraska, Massachusetts, and other states reliance has been placed by title examiners, purchasers, mortgagees and others on the validity of such statutes. A decision now that

the Iowa Statute is unconstitutional would call into question real estate titles not only in Iowa, but in many other states as well. The remarks of the Honorable Warren E. Burger printed on page 8a of appendix to Petitioners' petition indicates the need for a public policy to make real estate transactions less expensive and simpler. This Court can further the public policy and need by refusing certiorari in this case.

Turning to an answer to Petitioners' specific reasons for the request for a writ:

1. Substantive Due Process.

Petitioners argue they have a vested property right which exists even prior to their right to claim possession. Assuming, arguendo, that such is true, it is necessary the Petitioners understand the distinction between an existing right and an existing cause of action. It is not uncommon to have an existing right which requires a further event to occur before that right ripens into a cause of action. An example is that of a mortgagee, who, immediately upon execution of a note and mortgage, obtains an existing right in property, but requires a further event to occur, viz. default of the mortgager, before acquiring an existing cause of action to enforce the prior existing right.

When examined in this light, it becomes clear that the Iowa Statute does not eliminate the existing right nor is it an automatic divestment of a vested property intent. Instead, it merely requires that the person claiming that right give notice or lose the right to enforce his property interest. *Wichelman* v. *Messner*, supra, *Hiddleston* v. *Nebraska Jewish Education Society*, supra, *Town of Brookline* v. *Carey*, supra, and *Selectment of Town of Nahant* v. *United States*, supra, all speak to this point. Petitioners claim that the denial of substantive due process occurrs because the remedy is barred before any right of enforcement arises.

However the statute merely requires that those claiming a reversionary interest give notice of that claim. There is no requirement that the Petitioners begin enforcement of the reversionary right at a time prior to its maturity. Once notice of the claim of a reversionary interest is filed, the right exists and is not cut off. The right of enforcement is lost only because of the failure of the person claiming to file a notice of claim.

2. Procedural Due Process.

Petitioners contend that they have been denied procedural due process in that they have had property taken without notice and hearing. They cite *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Thorp Credit, Inc.* v. *Barr*, 200 N.W. 2d 535 (Iowa, 1972), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

Fuentes and *Thorp Credit*, both supra, are cases which speak to the notice required in judicial proceedings before property is taken. They have no bearing on what notice must be given before legislation is passed. Respondent does not believe that these cases, or the *Mullane*, supra, case require a specific notice and hearing for the enactment of legislation. To accept Petitioners' argument would be to say that any person could avoid the consequences of a statute by claiming he did not have notice and an opportunity for hearing. Such a decision would, of course, mean an end to legislation as a practical matter.

The Iowa legislature has given as much notice as could reasonably be required to inform citizens of the enactment of this statute. It would be impossible to notify each person individually, because those affected by such a statute are unknown to the legislature.

3 & 4. Impairment of Contract and Vagueness

Finally, Respondent turns to the question of whether the Supreme Court of the United States should even

consider the Questions presented in Question III and Question IV. The Iowa Supreme Court has a long history of holding that constitutional issues which were not presented and argued in the trial court will not be considered when presented for the first time on appeal. The opinion contained in the appendix to Petition for Writ of Certiorari filed by Petitioners, at page 3a states:

> "Since the first two assignments above set forth (the same as Questions III and IV here) are here asserted for the first time they will not be entertained save and except as incident to a determination of other issue properly presented, (citations)." (explanation added).

The Supreme Court of the United States has long taken the position that it will not consider a federal question if not properly presented in the Court below. See, e.g., *Williams* v. *Georgia*, 349 U.S. 375, 382-3; *Hulbert* v. *Chicago*, 202 U.S. 275; *In re Lamkin*, 355 U.S. 59; *Ferguson* v. *Georgia*, 365 U.S. 570, 572.

CONCLUSION

Respondent believes that the Petition for Writ of Certiorari should be denied. The Petition states no significant conflict between states in decision; public policy indicates the correctness of the lower court decision, and it can be seen that on the merits the decision in the lower court is correct. Respondent respectfully requests that the Writ be denied.

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